STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. PEN-24-66

DONALD M. GREENWOOD,

Plaintiff-Appellant

v.

BENJAMIN LILIAV, M.D., EASTERN MAINE MEDICAL CENTER, AND EASTERN MAINE HEALTHCARE SYSTEMS,

Defendants-Appellees

On Appeal from the Superior Court
Civil Docket, Penobscot County

REPLY BRIEF OF APPELLANT DONALD M. GREENWOOD

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I. INTRODUCTION

Both at trial and here on appeal, Appellees concede that they were not parties to the workers' compensation settlement release (the "Release") they seek to enforce. That concession, combined with the trial court's allowance of collateral source evidence in the form of Appellant's workers' compensation settlement, makes the resolution of this appeal straightforward. Because Appellees were not parties to the Release, the only way they can enforce it is by showing that they are intended beneficiaries of the Release. This appeal thus raises two fundamental issues:

1. How should Maine courts determine intended beneficiary status to a contract?

2. Should Maine courts instruct juries in negligence trials to decide whether a plaintiff's workers' compensation award fully compensated him for his tort damages?

These are not novel questions. The answers have been part of Maine jurisprudence for decades. As explained in Appellant's principal appeal brief, the answers are:

1. Maine courts should look to Section 302 of the Restatement (Second) of Contracts to determine whether a person is an intended beneficiary to any contract;[1] and

[1] *Perkins v. Blake*, 2004 ME 86, ¶ 8, 853 A.2d 752, 754.

2. Maine courts should exclude workers' compensation in negligence trials because it is inadmissible collateral source evidence.[2]

But when confronted with both options in this case, the trial court did neither. Instead of following the Restatement, and long-established Maine precedent, to analyze intended beneficiary status, it relied on this Court's outdated holding in *Steeves v. Irwin*, 233 A.2d 126 (Me. 1967). And rather than exclude collateral source evidence, it not only admitted Appellant's comp settlement, it instructed the jury to use that evidence to decide whether workers' comp fully compensated Appellant for his tort damages.

While Appellant's principal brief addresses the above at length, Appellees' opposition raises narrower issues that merit a response. This Reply Brief will focus more specifically on what makes the trial court's reliance on *Steeves* an error of law, both in the context of its instructions to the jury regarding the intent of the parties to the comp release, as well as the use of collateral source evidence to determine that intent.

II. ARGUMENT

The gist of Appellees' argument is that *Steeves* is still good law, and the trial court therefore did not commit reversible error because it followed *Steeves*. They

[2] *Nason v. Pruchnic*, 2019 ME 38, ¶ 22, 204 A.3d 861, 869.

break it down into two pieces: (a) *Steeves* does not substantively differ from Section 302 of the Restatement (Second) of Contracts ("Section 302") with respect to the determination of intended beneficiary status; and (b) the introduction of Appellant's workers' comp settlement did not violate the collateral source rule (and even if it did, say Appellees, it was harmless). But the Appellees'—and therefore trial court's—reliance on *Steeves* is wrong twice over.

First, with respect to the intended beneficiary determination, and under these facts, *Steeves* and Section 302 reach opposing results. When examining whether a contract created an intended beneficiary for a release, *Steeves* instructs the factfinder to focus on the intent of the injured employee—the promisor—in releasing third parties. But Section 302 instructs the factfinder to focus on the intent of the comp insurer—the promisee—in allowing third parties to have the benefit of the release. Under these facts, in other words, the two methods focus on the intent of *opposing parties* to the contract.[3] Appellees' argument works only if Appellant is the promisee to the Release—he is not.

[3] In Appellant's principal brief, he misstated the applicable law with respect to Section 302, confusing Appellant as the promisee. This was incorrect. Appellees' opposition brief continued the error, however, and Appellees have proceeded under the belief that Appellant is the promisee to the release. This is incorrect. And because this legal error was memorialized in jury instructions, Appellant brings it to this Court's attention. *See Russell v. Accurate Abatement, Inc.*, 1997 ME 98, ¶ 4, 694 A.2d 921, 923 ("We review jury instructions in their entirety for legal error.").

Second, not only did the introduction of the workers' comp settlement constitute a *per se* violation of the collateral source rule, its effect was anything but harmless.

A. The trial court committed legal error when it instructed the jury to examine Appellant's intent in signing the Release rather than instructing the jury to examine the comp insurer's intent as required by Maine law and Section 302 of the Restatement.

Appellees contend that it makes little difference whether the court had relied on *Steeves* or Section 302; that the trial court's instructions to the jury were derived from *Steeves* and do "not substantively differ from the provisions of Subsection (1)(b) of Restatement (Second) of Contracts § 302." Opp. Br. at 6. But closer inspection of *Steeves* and Section 302 here reveals that each doctrine results in an opposing conclusion.

1. Maine law looks to the intent of the promisee of a contract in determining whether the contract created an intended beneficiary.

The "controlling law" in Maine for examining an intended beneficiary to a contract "is set forth in the Restatement (Second) of Contracts" Section 302. *Denman v. Peoples Heritage Bank, Inc.* 1998 ME 12, ¶ 8, 704 A.2d 411, 414; *see also Perkins v. Blake*, 2004 ME 86, ¶ 8, 853 A.2d 752, 754 ("We have relied on Restatement (Second) of Contracts § 302 in deciding whether a third party was an intended beneficiary who could enforce a contract."). Section 302 states that a contract creates an intended beneficiary where "the circumstances indicate that the

promisee intends to give the beneficiary the benefit of the promised performance." Restatement (Second) of Contracts, § 302(1)(b) (1981) (emphasis supplied). The Restatement defines promises, promisors, and promisees as follows:

> (1) A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.
>
> (2) The person manifesting the intention is the promisor.
>
> (3) The person to whom the manifestation is addressed is the promisee.

Restatement (Second) of Contracts § 2 (1981).

In other words, the person promising to do or not do something is the promisor, and the person to whom the promise is being made is the promisee. The promisee is the person who benefits from the promise *See, e.g.*, *Denman*, 1998 ME 12, 704 A.2d 411 (determining whether plaintiff injured on icy sidewalk was intended beneficiary of maintenance contract between contractor and property owner by examining the intent of the property owner—the promisee of the promise to keep the sidewalk clear).

2. Appellant was the promisor to the Release, and his employer's comp insurer was the promisee.

Under the Release here, Appellant is the promisor promising to release his claims and his employer's comp insurer is the promisee—the recipient of the benefit

of the promise of release.[4] So, under Section 302, the "controlling law" in Maine in determining intended beneficiary status, Appellees will be intended beneficiaries only if they can prove that the comp insurer, as promisee of the Release, intended them to be.

3. The trial court erred as a matter of law when it instructed the jury to examine Appellant's intent instead of the comp insurer's intent in signing the Release.

Rather than instruct the jury that it should examine the intention of the promisee comp insurer, though, the trial court focused on the intention of the promisor Appellant. It instructed the jury that Appellant did "not release any medical providers unless, number 1, he actually intended" to release them. (A183; Opp. Br. at 6). This instruction was based on its reading of *Steeves*,[5] which explicitly states that a workers' comp release applies to a malpractice defendant "only if it was the intention of the injured plaintiff so to release him. . . ." *Steeves*, 233 A.2d at 136. The court did not instruct the jury to consider the employer's/comp insurer's intention in executing the Release at all.

The court instructed the jury under the wrong law. For decades, the "controlling" law in Maine for determining intended beneficiary status has been

[4] On the other hand, with respect to the payment of the workers' comp settlement, Appellant is the promisee, and his employer's comp insurer is the promisor.

[5] "[T]he Trial Court derived this language from *Steeves*. . ." Opp. Br. at 6.

Section 302 of the Restatement. And Section 302 states that what matters (beyond the fact that the contract should indicate that both parties to the contract considered creating an intended beneficiary) is the intention of the promisee in creating an intended beneficiary.[6]

Appellees argue that the failure to instruct the jury regarding the intent of the comp insurer is harmless because the language of the Release is evidence of the parties' intent. This is incorrect for at least two reasons. First, the Release and all of its associated documents, including the ALJ's findings of fact and conclusions of law, are evidence that neither party to the Release intended to release any third parties. And second, even if the Release is evidence of the intent of both parties, the trial court still instructed the jury incorrectly as a matter of law. The court told the jury to determine the intent of Appellant in signing the Release when Maine law required them to determine the intent of the comp insurer in signing the Release.[7]

[6] This Court has stressed that an intended beneficiary must be the product of more than a happy accident. "It is not enough that [plaintiff] benefitted or could have benefitted from the performance of the contract. The intent must be clear and definite, whether it was expressed in the contract itself or in the circumstances surrounding its execution." *Denman v. Peoples Heritage Bank, Inc.*, 1998 ME 12, ¶ 9, 704 A.2d 411, 414-15 (internal quotations omitted).

[7] Appellees also fault Appellant for failing to call witnesses to support the comp insurer's intent and failing to submit jury instructions consistent with Section 302. But the trial court had already ruled that it would follow *Steeves* and instruct the jury to consider the intent of the injured employee by the time Appellant would have been in a position to call any such witness or submit any such jury instruction.

And the court was aware of the problem. In discussing its decision, the court explained the difficulty in choosing between *Steeves* and the general law on intended beneficiaries.

> But as I've indicated, . . . I cannot make a way in my own mind to figure out how to make *Steeves v. Irwin* and the third-party beneficiary analysis consistent.

Day 5 Tr. at 18:2-5.

The trial court should have instructed the jury that it needed to decide whether the comp insurer intended for Appellees to be beneficiaries of the Release. It did not. As the party asserting the affirmative defense of Release, Appellees had the burden to show that the comp insurer intended for all tort defendants to benefit from the release.[8] They did not. The jury instructions were wrong on the law, and Appellees did not meet their burden of proof. These legal errors require reversal.

B. The workers' comp settlement evidence violated the collateral source rule, and its introduction was not harmless.

After the jury found Appellees liable for medical malpractice in Phase 1 of the trial, it was then (a) told how much money Appellant received from workers' comp and (b) instructed to determine whether that comp money had fully compensated

[8] As the proponent of the affirmative defense of release, Appellees had the burden of proof on that issue. *See Bean v. City of Bangor*, 2022 ME 30, ¶ 6, 275 A.3d 324, 327 ("As a general rule, the party opposing a claim, usually a defendant, has the burden of proof on . . . an affirmative defense.") (internal quotation omitted). Appellees had a heightened burden as well, needing to "show more than that they benefitted from the contract," but that the promisee "had a clear and definite intent that they receive an enforceable benefit under the contract." *Fleet Bank of Me. V. Harriman*, 1998 ME 275, ¶ 7, 721 A.2d 658, 660.

Appellant for all of his injuries. (A94, 105:15-23). If the jury did so find, then it was instructed to find that the Release applied to Appellees, effectively reducing the medical malpractice award to $0.

Workers' comp payments are collateral source evidence. *See, e.g., Nason v. Pruchnic*, 2019 ME 38, ¶ 22, 204 A.3d 861, 869 ("[T]he collateral source doctrine typically precludes evidence of workers' compensation. . . ."). The collateral source rule generally excludes collateral evidence because the introduction of such evidence presents a "substantial likelihood of prejudicial impact." *Grover v. Boise Cascade Corp.*, 2004 ME 119, ¶ 24, 860 A.2d 851, 859 (internal quotations omitted). And courts have long understood "that evidence of collateral benefits is readily subject to misuse by a jury." *Eichel v. N.Y. Cent. R. Co.*, 375 U.S. 253, 255 (1963). Beyond the inherently prejudicial nature of the evidence, this Court has held that the rule also enforces the policy choice to allow any windfall from collateral compensation to inure to the benefit of the injured plaintiff, and not the negligent tortfeasor. *Werner v. Lane*, 393 A.2d 1329, 1335-36 (Me. 1978).

Appellant's comp settlement is collateral source evidence. Thus, the evidence of the comp settlement carries a "substantial likelihood of prejudicial impact"[9] and is "readily subject to misuse by a jury."[10] Appellees still argue, as they must, that its

[9] *Grover v. Boise Cascade Corp.*, 2004 ME 119, ¶ 24, 860 A.2d 851, 859.
[10] *Eichel v. N.Y. Cent. R. Co.*, 375 U.S. 253, 255 (1963).

introduction did not violate the collateral source rule. (Opp. Br. at 12). They are wrong.

1. The collateral source evidence was inadmissible because it allowed Appellees to imply that Appellant was double-dipping.

First, Appellees say that because the jury did not know about the comp settlement until Phase 2 of the trial, then the evidence could not have prejudiced Appellant because it was not used to mitigate his damages in Phase 1. (Opp. Br. at 12). This is a nonstarter. The evidence violated the collateral source rule, not because it affected the jury's Phase 1 award, but because the jury used it in Phase 2 to determine that the Release applied to Appellees and effectively nullified the Phase 1 award. The court specifically instructed the jury to decide whether the comp settlement fully compensated Appellant for his tort injuries and whether Appellant intended to release Appellees when he settled his comp claims. (A184, 106:19-107:2).

In other words, in Phase 2, the trial court effectively asked the jury to look at the collateral compensation Appellant received and decide whether Appellant was trying to double dip. This was a *per se* violation of the collateral source rule, allowing any benefit of the collateral source payment to inure, not to the benefit of the injured victim, but to the (adjudicated) negligent tortfeasor. Then, Appellees leaned into the prejudicial nature of the evidence in closing, stating that Appellant was playing "with

house money," that he had a "bird in the hand," or that he had a "no-lose proposition." (Day 5. Tr. at 93:4-17). This type of prejudicial pandering is exactly why this Court adopted the collateral source rule.

What's more, as explained in Appellant's principal brief, because workers' comp does not pay for pain and suffering as a matter of law, it is a legal impossibility for workers' comp to fully compensate Appellant for the damages he suffered in tort. Although Appellees argue that the Release somehow expanded the type of damages that Appellant received from workers' comp, the reality is that comp was never "intended to make the employee whole—it excludes benefits for pain and suffering. . . ." *Breton v. Travelers Ins.*, 147 F.3d 58, 63 (1st Cir. 1998). *Steeves* is thus wrong as a matter of law because it instructs juries as if workers' comp paid injured employees for their tort damages, when in fact that is impossible.[11] The reliance on *Steeves* was legal error, and the introduction of the workers' comp evidence violated the collateral source rule.

2. The collateral source evidence was not used for a permissible purpose.

The workers' comp settlement was collateral source evidence, and its introduction violated the collateral source rule. It is as simple as that. But Appellees

[11] The instruction makes even less sense when one remembers that Appellant's workers' comp settlement covered his lost wages and medical payments for *all* of his injuries, not just the two damaged fingers this whole case is about.

contend that even if it was collateral source evidence, it was introduced for a separate, admissible purpose. Proceeding again on the assumption that *Steeves* is still good law, Appellees correctly note that this Court has "recognized that evidence of receipt of benefits from a collateral source under certain circumstances might be admissible for purposes other than to mitigate damages recoverable from the tortfeasor." *Werner*, 393 A.2d at 1336. They then argue that, because the Court in *Steeves* reasoned that juries must consider the workers' comp settlement to determine the scope of the release, then the evidence is therefore being used for an admissible purpose. (Opp. Br. at 13).

The entire problem with the trial court's reliance on *Steeves* is that it permitted the jury to consider collateral source evidence as part of its decision to nullify the tort liability that it had assigned to Appellees. Courts cannot simply say that parties can introduce collateral source evidence for some other ostensibly acceptable purpose precisely because it is so prejudicial. As the United States Supreme Court has noted, beyond being "inadmissible to offset or mitigate damages," collateral source evidence should also be excluded where "the likelihood of misuse by the jury clearly outweighs the value" of the evidence. *Eichel*, 357 U.S. 254-55. Such is the

case here. The comp settlement was too prejudicial, too likely for the jury to misuse or misunderstand, and it should have been excluded.[12]

C. The compounded errors below require a new trial.

There is at least one thing that Appellant and Appellees agree on—the second-best result of this appeal would be entry of judgment on the jury's Phase 1 findings. But the errors made by the trial court were so pervasive and affected so many strategic decisions that the only fair result would be to remand for a new trial. Appellant's trial counsel went into Phase 1 of the trial knowing that Appellant's comp settlement would be revealed to the jury in Phase 2, affecting their strategy, and so did counsel for Appellees. Because the Trial Court ruled that the question of sufficiency of the settlement would only go to the jury if the damages in Phase 1 were less than $190,000,[13] Appellees were able to specifically ask for the jury to award an amount that would allow them to get to Phase 2. *See* Day 4 Tr. at 74:10-12 ("But if you do decide to award damages, I'm going to suggest to you $180,000 would be fair and appropriate. That's only a suggestion.").

[12] Also, for all of the reasons listed in this Reply, and in Appellant's principal brief, the introduction of the workers' comp settlement was anything but harmless.

[13] *See* Opp. Br. at 3 n.1. The court's ruling made sense under *Steeves*. If the jury awarded damages in excess of $190,000, it would confirm the $190,000 workers' compensation settlement did not fully compensate Appellant for his damages.

Too many mistakes were made at the trial level. This case should be retried. If not, then the case should be remanded to the trial court to enter judgment on the jury's $180,000 award from Phase 1.

III. CONCLUSION

The creation of the workers' compensation statutory lien implicitly overruled *Steeves*. By relying on it, the trial court instructed the jury to determine whether Appellees were intended beneficiaries of the Release under an incorrect legal standard. It also introduced highly prejudicial collateral source evidence that never should have been heard by the jury. Accordingly, Appellant respectfully requests that this Court reverse the verdict and remand this case to the Penobscot County Superior Court for a new trial.

Dated at Lewiston, Maine this 26 day of August 2024.

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CERTIFICATE OF SERVICE

I, Jodi L. Nofsinger, Esq. Attorney for Plaintiff-Appellant Donald Greenwood, hereby certify that I have served two copies of the Reply Brief of Appellants upon all counsel of record via email and by depositing the same in the United States Mail, postage prepaid, on August 26, 2024, as follows:

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